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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1290

GREAT WESTERN BROADCASTING CORPORATION, d/b/a KXTV, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Great Western Broadcasting Corporation, d/b/a KXTV (herein called KXTV), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on February 9, 1966.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit here involved is reported at 356 F. 2d 434 and is printed in Appendix A hereto, *infra*, pp. 2a-6a. The Supplemental Decision of the National Labor Relations Board (herein called the

Board), affirmed by this decision of the Court of Appeals, is reported at 150 NLRB No. 46 and is printed in Appendix B hereto, *infra,* pp. 7a-15a. The prior decision of the Court of Appeals in this matter is reported at 319 F. 2d 591 and is printed in Appendix C, *infra,* pp. 17a-32a. The original decision of the Board in this matter is reported at 134 NLRB 1617 and is printed in Appendix D, *infra.* pp. 33a-40a.

JURISDICTION

The judgment of the Court of Appeals here involved was entered on February 9, 1966 (*infra,* p. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Board in its original decision (*infra,* pp. 33a-40a) dismissed the complaint of its General Counsel alleging that the respondent Unions before the Board[1] had violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act (herein called the Act). This section, set forth in full in Appendix B (*infra,* pp. 41a-43a), prohibits, *inter alia,* threats, coercion or restraint to require "any person" "to cease using, selling, handling," etc., the "products of any producer, processor, or manufacturer" or "to cease doing business with any other person". The charged violation here was the secondary pressure exerted on persons who advertised over KXTV, with which latter the Unions had a primary labor dispute, to force such advertisers to cease doing business with KXTV through threatened and actual inducement of customer boycotts of the products sold

[1] American Federation of Television & Radio Artists, San Francisco Local, and National Association of Broadcast Employees & Technicians, Local 55 (herein called the Unions).

by such advertisers. The Board held that by furnishing advertising services to the advertisers, KXTV became one of the producers of the products sold by the advertisers and, therefore, the publicity proviso to Section 8(b)(4) of the Act (*infra,* pp. 42a-43a) exempted the Unions' conduct from this prohibition of the Act (*infra,* pp. 13a-14a). The Court of Appeals, in its original decision, rejected the Board's rationale and remanded the matter to the Board. Thereafter, this Court's decisions in *N.L.R.B.* v. *Servette, Inc.,* 377 U.S. 46, and *N.L.R.B.* v. *Fruit & Vegetable Packers & Warehousemen, Local 760* (*Tree Fruits*), 377 U.S. 58, were issued. Relying on these two decisions, the Board, in its supplemental decision, reaffirmed its original rationale as to the application of the publicity proviso to the instant matter, and its dismissal of the complaint, and the Court of Appeals, on supplemental review, reversed its former holding and affirmed the Board's supplemental decision and dismissal. The questions presented, therefore, are—

1. Whether the Court of Appeals and the Board properly construed the *Servette* and *Tree Fruits* decisions of this Court, issued in situations in which the products of the secondary employers were actually produced or handled on the way to the secondary employers and the consumers by the employers with whom the unions there had the primary disputes, as applicable to a situation in which the primary employer never handled the products of the secondary employers but merely was "doing business" with the secondary employers by furnishing an advertising service which helped produce customers for the secondary employers' products but not the products themselves.

2. Whether advertising media like television and radio stations, and publishers of newspapers and magazines, which produce products of their own, the televised and broadcasted programs and the newspapers and magazines (which products themselves may be subjected to a secondary consumer boycott), within the meaning of the publicity proviso to Section 8(b)(4) of the Act help produce the products and services sold by the advertisers who utilize their media, including such products as, as here, automobiles, bread, gasoline, beer, and moving, cleaning and banking services.

3. Whether this Court by stating in *Servette* that the "protection of the proviso was [not] intended to be any narrower in coverage than the prohibition to which it is an exception" (377 U.S., at p. 55), (a) meant, as the Court of Appeals and the Board held in effect, that *all* "publicity, other than picketing" which does not induce a secondary work stoppage is excluded by the proviso from the prohibition of Section 8(b)(4) of the Act, or (b) meant, as KXTV contended below, only that the exemption of the proviso is as broad as the prohibition of Section 8(b)(4) against proscribed conduct for "an object" of requiring any person "to cease using, selling, handling", etc., "the products of any other producer, processor, or manufacturer", leaving unrestricted the prohibition of Section 8(b)(4) under which the complaint herein was issued against similar conduct for "an object" of requiring any person "to cease doing business" with another person, which "doing business" relationship, as here, does not involve the distribution of a "product" "produced" or physically handled by the "primary" employer.

STATUTE INVOLVED

The statutory provisions directly involved are those of Section 8(b)(4) of the National Labor Relations Act. They are printed in Appendix E hereto, *infra*, pp. 41a-43a.

STATEMENT OF THE CASE

1. The Facts

KXTV operates a television station at Sacramento, California (R. 39, 86).[2] In connection with a primary labor dispute with KXTV, the Unions exerted coercion and restraint upon various persons who advertised their products over KXTV to cease doing business with KXTV (1) by orally threatening to publish the names of persons who continued to advertise over KXTV, (2) by letter threatening economic reaction against those who continued to advertise over KXTV, (3) by handbills distributed at various locations publicizing the names of those who continued to advertise their products over KXTV, (4) by letters requesting the San Francisco Labor Council and the members of its affiliated unions to return their credit cards to a gasoline station chain, which continued to advertise over KXTV, and soliciting "any aid" the Council and its affiliates "can give" in respect to 14 listed companies who continued to advertise over KXTV, and (5) by threatening two advertisers with being handbilled if they continued to advertise over KXTV (R. 85-93, 97-131). Among the advertisers were automobile dealers, bakeries, a national gasoline service station chain,

[2] The symbol "R." identifies reference to pages of the printed record in the original review proceedings in the Court of Appeals which, by stipulation, was incorporated as part of the record in the supplemental review proceedings.

breweries, an optometrist, and moving and storage, banking and cleaning services (*ibid.*).

Upon charges filed by KXTV (R. 3-18) the General Counsel of the Board issued his complaint under Section 8(b)(4)(ii)(B) of the Act (R. 19-27), which section, in pertinent part, provides:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> "(4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is—
>
> "(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, * * *."

The complaint alleged that the object of the Unions' conduct was to force the advertisers "to cease doing business with" KXTV. The trial examiner of the Board, after hearing, sustained the complaint (R. 57-59).

2. The Original Board Decision

The majority of a three-member panel of the Board, upon exceptions by the Unions, reversed the trial examiner and dismissed the complaint (R. 65-75; *infra,* pp. 33a-40a), holding that the secondary consumer boycott was permissible under the publicity proviso to Section 8(b)(4) (*infra,* pp. 42a-43a). That proviso exempts from the prohibition of the section—

> "* * * publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organiza-

tion, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer * * *."[3]

In rejecting KXTV's argument that it did not "produce" a "product or products" which were "distributed" by its advertisers, the panel majority held that KXTV, "by adding its labor in the form of capital, enterprise and service to the products which it advertises for secondary employers becomes one of the producers of the product which it advertises" (R. 73; *infra*, p. 39a).

3. The Original Court of Appeals Decision

The Court of Appeals, after thorough discussion in its unanimous decision of November 9, 1962 (310 F. 2d, at pp. 595-600; *infra*, pp. 17a-32a), concluded, contrary to the Board, that the "publicity proviso * * * does not protect publicity to the effect that television service is rendered by a station with whom the labor organization has a primary dispute, which service is utilized by other employers". Accordingly, the Court of Appeals remanded the matter to the Board for determination as to whether the Unions' conduct constituted threats, coercion, or restraint prohibited by Section 8(b)(4)(ii)(B).[4]

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[3] This exemption is nullified if the "publicity other than picketing" has the "effect of inducing" a secondary work stoppage (see *infra*, pp. 42a-43a).

[4] The Court of Appeals also remanded for Board consideration the Unions' claim that their conduct was protected by the free speech and free press provisions of the Constitution (310 F. 2d, at p. 600; *infra*, p. 32a). The Board, on the remand, presumed the constitutionality of the statute (*infra*, p. 15a). The Court of Appeals, in its second decision, did not meet the issue (*infra*, p. 4a).

4. The Supplemental Decision of the Board

On remand, in a Supplemental Decision, the Board found that the Unions' conduct constituted "restraint or coercion within the meaning of Section 8(b)(4)(ii) of the Act" (*infra,* pp. 11a-13a). Nonetheless, the Board, relying on the intervening decisions of this Court in *Servette* and *Tree Fruits,* adhered to its prior conclusion that "KXTV, by the addition of its services (advertising) to the products involved here, is a 'producer' within the meaning of the provisio" of its advertisers' products, and reaffirmed its dismissal of the complaint (*infra,* p. 14a).

5. The Second Decision of the Court of Appeals

On supplemental petition to review the supplemental decision of the Board, the Court of Appeals reversed its prior conclusions and affirmed the Board's supplemental decision. In doing so, the Court of appeals, *inter alia,* stated (*infra,* pp. 5a-6a):

> "In *Servette,* the Supreme Court held that one who is engaged in the wholesale distribution of tangible articles manufactured by another, is himself a producer of such products, within the meaning of the publicity proviso. It seems to us that it must follow that one who is engaged in the business of advertising tangible articles manufactured by another, is likewise a producer of such products within the meaning of the proviso.
>
> "But KXTV is not engaged solely in advertising tangible articles. It also advertises banking, cleaning and other services. In our former opinion we pointed out the incongruity involved in regarding a television station as a producer of services inasmuch as the 'products' referred to in the proviso are to be of a kind which are distributed by another employer. 310 F. 2d at 597.

"Nevertheless, the Supreme Court has spoken in such broad terms in *Servette,* that we think the incongruity to which we referred may not control the ultimate decision. The Supreme Court appears to place prime reliance upon the legislative history, and nothing has been called to our attention which indicates that Congress intended to differentiate between primary employers engaged in the production of tangible products and those involved in rendering services.

"In *Servette,* the Supreme Court said, at page 55:

> 'There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress.'

"The prohibition set forth in section 8(b)(4)(ii)(B) covers the cited union activity, else KXTV would not have a case to begin with. The Supreme Court has said that the publicity proviso is to be given as broad an application as the statutory prohibition. It follows that, whatever difficulties an analytical dissecting of the proviso may reveal, they are not to stand in the way of giving that proviso a scope commensurate with the section to which it is appended."

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals applying the decision of this Court in *Servette,* involving a totally different factual situation, to a television station is of tremendous importance to the thousands of television and radio stations and newspapers and magazines, and other advertising media, in the country and to their hundreds of thousands of clients who advertise

through their media and, it is submitted, the decision should be reviewed by this Court.

If the present decision is not reviewed by this Court, petitioner knows of no manner in which the question may ever again reach the Court. With the Board having consistently adhered to its view that advertising media by furnishing advertising services help produce the products of clients who advertise through their media,[5] and the second decision of the Court of Appeals here having affirmed such view, it is wholly unlikely that the General Counsel of the Board will ever again issue a complaint to test the correctness of the Board's view.[6] Thus, the Board's interpretation and application of the publicity proviso to the products of secondary persons who utilize advertising facilities of persons having primary labor disputes to produce customers will become settled law without this Court having considered or endorsed this extreme interpretation and application.

Thousands of newspapers, magazines, television and radio stations, and other advertising media, will be vulnerable to secondary pressure and hundreds of thousands of merchants and manufacturers who advertise in newspapers and periodicals, and over radio and television stations, will be vulnerable to union boycotts of the products they sell induced by "publicity, other than picketing", regardless of the merits of whatever labor dispute the advertising media may be involved in, notwithstanding the express Congressional

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[5] See *Middle South Broadcasting Co.*, 133 NLRB 1698; *Ypsilanti Press, Inc.*, 135 NLRB 991.

[6] See 93 *Cong. Rec.* 7001, 7691; *Legisl. Hist. Labor Management Relations Act 1947*, vol. 2, pp. 1623, 1656.

limitation of the proviso to "a product or products" "produced by an employer" with whom the Union "has a primary dispute" and which "are distributed" by the secondary employer (*infra,* p. 42a). Moreover, if the decision of the court below is permitted to stand, this secondary pressure and these boycotts may be directed at advertisers who themselves only furnish services to their customers, such as moving, cleaning and banking establishments.

2. The Court of Appeals and the Board misconstrued this Court's decision in *Servette.*

(a) In that case, this Court merely agreed with the Board "that products 'produced by an employer' included products distributed, as [there], by a wholesaler with whom the primary dispute exists" (377 U.S., at p. 55). To support this conclusion, the Court cited as "not unfamiliar to Congress" the definitions of "produced" and "production" appearing in the Fair Labor Standards Act (29 U.S.C. § 203(j)), which speak in terms of "produced, manufactured, mined, *handled,* or in any other manner *worked on*", and "producing, manufacturing, mining, *handling, transporting,* or in any other manner *working on*" (*ibid.;* emphasis added).[7] These definitions, as the Court in *Servette* noted (377 U.S., at p. 56), had been held to apply to the "wholesale" and "retail" distribution of goods.

But both these definitions and the cited applications are restricted to situations in which a product is "pro-

[7] *United States* v. *Montgomery Ward & Co.,* 150 F. 2d 369 (C.A. 7), cited by this Court in *Servette* (377 U.S., at p. 56, fn. 15), looked at these definitions for guidance for interpretation of the term "production" as used in the War Labor Disputes Act (150 F. 2d, at pp. 376-377).

duced" or "production" is accomplished by a physical "handling" or "working on" the product in some manner. In the situation in *Servette,* the "wholesaler" had, in fact, *handled* and *transported* the products enroute to the distributor which products so handled by the wholesaler were, in fact, *distributed* by the retailers, the secondary employers.

In the instant matter, however, KXTV did not physically *handle, transport* or *work on* the products enroute to the distributors, the secondary persons. After the products were "produced, manufactured, mined, handled", transported, and "worked on", and were in the hands of the retailer or distributor, KXTV merely furnished advertising facilities to produce *customers* for the distributors, not the products in their hands which they *distributed.* See *Columbia Broadcasting System, Inc.* v. *Amana Refrigeration, Inc.,* 295 F. 2d 375, 398 (C.A. 7), cert. denied 369 U.S. 812.

(b) The Court of Appeals asserted that unless the "prohibition in section 8(b)(4)(ii)(B) covers the cited union activity, * * * KXTV would not have a case to begin with" and that this Court in *Servette* "has said that the publicity proviso is to be given as broad an application as the statutory prohibition" (356 F. 2d, at p. 436). In support, the Court of Appeals quoted the following language from this Court's decision in *Servette*—

> "* * * There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress."

However, the Court of Appeals was in error in assuming that the foregoing language of this Court was applicable to *all* prohibitions of Section 8(b)(4)(B).

The "prohibition" to which the publicity proviso is an "exception" is that part of Section 8(b)(4)(B) *only* which prohibits certain conduct for "an object" of "forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the *products* of any other *producer, processor,* or *manufacturer*" (see 377 U.S., p. 56; emphasis added).

But, the "prohibition" of the statute under which KXTV claimed relief is that which proscribes conduct of the nature here involved for "an object" of "forcing or requiring any person * * * to cease doing business with any other person". KXTV's charges and the General Counsel's complaint all claimed relief under this prohibition of the Act (see R. 26, 4, 8, 14). The publicity proviso plainly is not an "exception" to the "doing business" "prohibition", unless the "doing business" involves the distribution of a "product" "produced" by the "primary" employer.

3. The decisions of the Court of Appeals and the Board conflict with the plain intent of Congress.

(a) The fact that, after proscribing certain conduct for "an object" of "forcing or requiring any person to cease using," etc., "the products of any other producer, processor, or manufacturer", Congress also found it necessary to prohibit such conduct for the purpose of "forcing or requiring any person * * * to cease doing business with any other person" fully discloses Congressional recognition that all secondary boycotts *do not* involve products of producers. Some

secondary boycotts, as here, merely involve disruption of business relations which do not relate to "products" "produced" by the primary employer and "distributed" by the secondary employer.

When the boycott does not involve a product of a producer, it is clear that Congress did not intend the proviso to be applicable. Had Congress intended the proviso to be applicable also to the "cease doing business" prohibition the proviso would have expressly so stated. Even better, Congress, if this were its intent, could have excluded from the prohibition of Section 8(b)(4)(B) *all* "publicity, other than picketing", which does not induce a secondary work stoppage, in much simpler language than that contained in the proviso as enacted; for example, in the following language:

> "* * * That for the purposes of this paragraph (4) only, nothing contained in this paragraph shall be construed to prohibit publicity, other than picketing, for an object proscribed in clause (B) thereof, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver or transport any goods, or not to perform any services, at the establishment of a secondary employer."

Compare this all-encompassing language with the restricted proviso Congress, in fact, adopted.

(b) The proviso to "paragraph (4)", limited as it is to "publicity, other than picketing" to advise the public that "products" "produced" by the primary employer are being "distributed" by the secondary employer, demonstrates only the possibility of Congressional concern over the constitutionality of a restric-

tion against consumer "publicity, other than picketing" which would interfere with the prior recognized right of unions to "follow the struck goods" for this purpose (see 337 U.S., p. 64, fn. 7). It indicates no Congressional concern over its constitutional power to prohibit consumer "publicity, other than picketing" for any of the other objects proscribed by Section 8(b)(4) of the Act. In addition to the absence of any license in the proviso for consumer "publicity, other than picketing" to require one person to cease doing business with another, the proviso *does not* sanction consumer "publicity, other than picketing" to force (1) a person to join a "labor or employer organization" or to enter into an "agreement which is prohibited by section 8(e)" (see Section 8(b)(4)(A) of the Act; *infra,* p. 41a); (2) an employer to "recognize or bargain" with a union which has not been certified by the Board (see Section 8(b)(4)(B) of the Act; *infra,* p. 41a); (3) an employer to "recognize or bargain" with a union when another union has been certified by the Board as the representative of the employees involved (see Section 8(b)(4)(C) of the Act; *infra,* p. 42a); (4) an employer to assign work to employees in one union or class rather than to those in another union or class (see Section 8(b)(4)(D) of the Act; *infra,* p. 42a). It is then plain that any Congressional concern over constitutionality had no reference to the factual situation here involved—a coercive consumer boycott of advertisers because they did business with a television station by utilizing the latter's advertising services to produce customers for their products, not the product of the television station.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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May, 1966.

APPENDIX

APPENDIX A

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,106

GREAT WESTERN BROADCASTING CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Decree

Before: BARNES, HAMLEY and JERTBERG, *Circuit Judges.*

This cause came on to be heard on the supplemental petition of the Great Western Broadcasting Corporation filed May 25, 1965 to review a supplemental order of the National Labor Relations Board entered December 16, 1964.

The Court heard arguments of respective counsel on January 12, 1966 and has considered the briefs and transcript of record filed in this cause. On February 9, 1966 the Court being fully advised in the premises handed down its decision in conformity thereto, it is hereby

ORDERED, ADJUDGED and DECREED by the United States Court of Appeals for the Ninth Circuit that the supplemental order of the Board be and hereby is enforced.

WM. B. LUCK,
Clerk

Filed Feb. 9, 1965

356 F. 2d 434

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,106

GREAT WESTERN BROADCASTING CORPORATION, d/b/a KXTV,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

[February 9, 1966]

On Supplemental Petition to Review Supplemental Decision of the National Labor Relations Board

[434] Before: BARNES, HAMLEY and JERTBERG,
Circuit Judges

HAMLEY, *Circuit Judge:*

This unfair labor practice proceeding is now in this court for the second time. The proceeding was instituted by the National Labor Relations Board on the complaint of Great Western Broadcasting Corporation, d/b/a KXTV. The complainant operates a television station in Sacramento, California. KXTV was having a labor dispute with the American Federation of Television and Radio Artists, San Francisco Local, and the National Association of Broadcast Em[435]ployees and Technicians, Local 55; and the complaint was filed against these unions.

The case involves an attempt by the two unions, assertedly using coercive methods, to force several companies to cease advertising on KXTV. In its complaint, the company charged that this union activity constituted an illegal secondary boycott as proscribed by section

8(b)(4)(ii)(B) of the National Labor Relations Act (Act), 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b)(4)(ii)(B) (1964). The Board, with one member dissenting, dismissed the complaint, holding that the questioned union activity was protected by the so-called publicity proviso to section 8(b)(4) of the Act.[1] This Board decision and order are reported at 134 N.L.R.B. 1617.

On review we reversed, holding that the publicity proviso does not protect publicity of the kind utilized by the respondent unions. We remanded the proceedings to the Board for a determination, on the merits, of two additional questions which had to be decided in disposing of the com-

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[1] Section 8(b)(4) provides in pertinent part:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

"(4) . . . (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—

• • •

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . .

• • •

"*Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution; . . ."

pany's complaint. These questions were: (1) did the unions' activity tend to "threaten, coerce, or restrain," within the meaning of section 8(b)(4)(ii)(B); and (2) is such union activity protected by the First Amendment of the Federal Constitution? *Great Western Broadcasting Corporation* v. *N.L.R.B.*, 9 Cir., 310 F. 2d 591, 600.

In the further agency proceedings following the remand, the Board found that all of the questioned union conduct, other than the mere request that neutrals not advertise on KXTV, constituted threats, coercion, or restraint within the meaning of section 8(b)(4)(ii)(B). However, and notwithstanding, the decision of this court reported in 310 F. 2d 591, the Board again dismissed the complaint on the ground that the unions' conduct was protected under the publicity proviso to section 8(b)(4). The Board did so on the basis of its conclusion that, in *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46, 54-47,[2] and *N.L.R.B.* v. *Fruit & Vegetable Packers & Warehousemen, Local 760* (Tree Fruits), 377 U.S. 58, decided after the remand, the Supreme Court had rejected this court's interpretation of the statute and had confirmed the Board's reading of the proviso.[3]
[436] KXTV has petitioned to review this supplemental order and the unions have intervened in support of the order.

The company contends that the Board should not have concerned itself with what the Supreme Court decided in *Servette* and *Tree Fruits,* because our holding on the

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[2] In *Servette,* the Supreme Court reversed the decision of this court rendered in *Servette, Inc.* v. *N.L.R.B.*, 9 Cir., 310 F. 2d 659. In its decision in *Servette,* this court relied upon certain conclusions stated in *Great Western Broadcasting Corporation* v. *N.L.R.B.*, 9 Cir., 310 F. 2d 591, regarding the applicability of the publicity proviso.

[3] In view of its second dismissal of the complaint, the Board found it unnecessary to, and thus did not, reach the issue of whether the questioned union activity is protected by the First Amendment.

previous appeal became the law of the case and is therefore binding upon the Board.

None of the cases cited in support of this argument involved the intervention of a Supreme Court decision between the initial and second court of appeals decision in a proceeding which is still pending. A departure from the "law of the case" doctrine is indicated where there is such an intervening Supreme Court decision. See *John Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82, 91; *City of Seattle* v. *Puget Sound Power & Light Co.*, 9 Cir., 15 F. 2d 794, 795.

The company argues, further, that nothing in the *Servette* and *Tree Fruits* opinions of the Supreme Court, in any respect disturbs the conclusions of this court in its prior decision in this case. We stated there, in effect, that the advertising services of KXTV did not make it a producer of the "automobiles, bread, gasoline and beer" distributed by its advertisers as required by the proviso; nor did KXTV become a producer of products by advertising "a service, such as banking or cleaning." The *Servette* and *Tree Fruits* decisions of the Supreme Court, petitioner asserts, merely indicate that this court's prior decision went too far, insofar as it was later construed in *Servette*, 9 Cir., 310 F. 2d 659, to hold that services of a wholesaler or distributor who physically handled tangible goods en route to the market place, was not a producer of the tangible products offered for sale to the public.

In *Servette*, the Supreme Court held that one who is engaged in the wholesale distribution of tangible articles manufactured by another, is himself a producer of such products, within the meaning of the publicity proviso. It seems to us that it must follow that one who is engaged in the business of advertising tangible articles manufactured by another, is likewise a producer of such products within the meaning of the proviso.

But KXTV is not engaged solely in advertising tangible articles. It also advertises banking, cleaning and other

services. In our former opinion we pointed out the incongruity involved in regarding a television station as a producer of services inasmuch as the "products" referred to in the proviso are to be of a kind which are distributed by another employer. 310 F. 2d at 597.

Nevertheless, the Supreme Court has spoken in such broad terms in *Servette,* that we think the incongruity to which we referred may not control the ultimate decision. The Supreme Court appears to place prime reliance upon the legislative history, and nothing has been called to our attention which indicates that Congress intended to differentiate between primary employers engaged in the production of tangible products and those involved in rendering services.[4]

In *Servette,* the Supreme Court said, at page 55:

> "There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress."

The prohibition set forth in section 8(b)(4)(ii)(B) covers the cited union activity, else KXTV would not have a case to begin with. The Supreme Court has said that the publicity proviso is to be given as broad an application as the statutory prohibition. It follows that, whatever difficulties an analytical [437] dissecting of the proviso may reveal, they are not to stand in the way of giving that proviso a scope commensurate with the section to which it is appended.

Affirmed.

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[4] The Board has applied the proviso to protect publicity aimed at services despite the fact that services are incapable of distribution by another employer. *Plumbers and Pipefitters Local Union 142,* 133 N.L.R.B. 307.

APPENDIX B

150 N.L.R.B. No. 46

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 20-CC-234

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SAN FRANCISCO LOCAL

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, LOCAL 55

and

GREAT WESTERN BROADCASTING CORPORATION, d/b/a KXTV

Supplemental Decision

On December 27, 1961, the Board issued a Decision and Order in the instant case[1] finding that the Respondent Unions had not violated Section 8(b)(4)(ii)(B) of the Act as alleged. The Board held, in substance, that Respondents' conduct was protected by the so-called "publicity proviso" to that section.

Thereafter, the Charging Party filed a petition to review the Board's Order. On November 9, 1962, the Court of Appeals for the Ninth Circuit reversed the Board,[2] holding that the television advertising services of the primary employer, television station KXTV, were not "a product or products" within the meaning of that term in the proviso to Section 8(b)(4). The Court remanded the case to the

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[1] 134 NLRB 1617.

[2] *Great Western Broadcasting Corporation* v. *N.L.R.B., et al.*, 310 F. 2d 591 (C.A. 9).

Board for consideration of two issues which were not reached by the Board in its original decision.[3]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The first issue set forth in the remand is:

Whether the conduct engaged in by the Respondents constituted threats, coercion or restraint within the meaning of Section 8(b)(4)(ii)(B) of the Act.[4]

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[3] On February 8, 1963, the Charging Parties' motion to remand for the taking of additional evidence was denied by the Board and the American Civil Liberties Union was granted leave to file an amicus curiae brief.

[4] Section 8(b)(4)(ii)(B) provides, in pertinent part, as follows:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is:
>
> • • • • •
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person—
>
> • • • • •
>
> Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;
>
> • • • • •

In setting forth the conduct which it wished the Board to evaluate, the Court pointed out that Respondents:

(1) had committees of the unions call upon all advertisers who used KXTV for the purpose of requesting them to discontinue their patronage of the station and assist the unions in their cause against KXTV;

(2) had a committee call upon Capitol Studebaker Company for the same purpose, in the course of which this advertiser was told that if it continued to advertise on KXTV the Labor Council would undoubtedly print the name of Capitol in the Labor Bulletin as not supporting the strike;

(3) mailed to all KXTV advertisers a letter setting forth the background of the strike and requesting discontinuance of advertising over the station, warning that failure to do so would bring an adverse economic reaction;

(4) printed and distributed four thousand handbills listing KXTV as "unfair," and naming Geer Chevrolet Company, Rainbo Baking Company, Shell Oil Company and Burgermeister Brewing Corporation as advertisers who nevertheless continued to utilize the services of the station, such distribution being made in front of KXTV, at the Sacramento Labor Temple, and at various Sacramento grocery stores which handled Rainbo bread and Burgermeister beer;[5]

(5) sent a letter to the San Francisco Labor Council asking the Council to return its Shell credit card to that company and to request the members of affiliated unions to do likewise;

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[5] Copies of this leaflet were also found stuffed between loaves of bread at a supermarket supplied by Rainbo. The leaflet carried this note:

> This statement is directed to customers of the above advertisers. It is not a request to employees to refuse to pick up, deliver or transport, or to refuse to perform any service.

(6) sent a later letter to the San Francisco Labor Council listing 14 companies who were then advertising on station KXTV, with the observation that "any aid" the Council and its affiliated members "can give in this sponsor area" would be appreciated;

(7) showed to the President of Handy-Andy, with an appeal to stop advertising on KXTV, a copy of the newly-printed leaflet which gave the background of the labor dispute with KXTV, named Handy-Andy as a company which continued to do business with KXTV, and added the comment: "We think you will agree that this continued association is contrary to the best interests of working people and the public";

(8) telephoned the general manager of Geer and, in conjunction with an appeal to have Geer cease advertising on KXTV, informed him that a new leaflet was being printed naming Geer as a sponsor still advertising on KXTV and that if Geer continued to do business with the station, this leaflet would be passed out in front of Geer's establishment, among other places.

The Board has reviewed the eight items of conduct enumerated in the Court of Appeals remand. We find that Item 1, a mere request to neutral employers unaccompanied by any coercive acts, did not involve prohibited activity within the meaning of Section 8(b)(4)(ii)(B).[6] However, with respect to the other seven items, we find that the acts were part of a campaign calculated to bring economic pressure upon the producers and distributors of products advertised on KXTV for the purpose of forcing the producers to cease advertising on KXTV. The acts complained of may be characterized as threats to distribute,

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[6] See *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46, 50-54.

and the actual distribution of, leaflets and letters[7] announcing that the named companies were continuing to advertise on KXTV, and appealing to consumers to support Respondent in its dispute with KXTV. The Respondent made no attempt to limit consumer response to a boycott of only the particular product or products advertised, and it is plain from a reading of the leaflets and letters, and from the threats made to advertisers that Respondent's object was the institution of a total boycott of all products produced by companies advertising on KXTV. With respect to Handy Andy, Geer Chevrolet, and Capital Studebaker, and Shell Oil Company, Respondent sought a total boycott of their retail establishments. With respect to Rainbo Baking Company, and Burgemeister Brewery, Respondent appealed to consumers to refrain from buying any of their products sold in retail establishments without regard to whether the particular product was advertised on KXTV.

Other than its dispute with KXTV, Respondent had no dispute with any producer or distributor of products advertised on KXTV, and the question presented is whether Respondent's activities described above, constitute restraint or coercion within the meaning of Section 8(b)(4)(ii) of the Act. The Supreme Court has held that picketing appeals to customers of a large retailer, which were limited

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[7] In making our findings with respect to item No. 5 (request to the San Francisco Labor Council to return Shell credit cards) we note, as stated in our original opinion, 134 NLRB 1617, 1618, that as a result of this request Shell received numerous letters enclosing Shell credit cards. We further note that as a result of item No. 6 (letter to the San Francisco Council observing that "any aid" from the Council would be appreciated) a synopsis of the Labor Council minutes of the meeting of January 6, 1961, was mailed to everyone on the mailing list, including member unions and individual members, in which it was requested that the recipients discontinue purchases of the products or use of the services of specified companies who were still advertising on KXTV.

to requesting customers to refrain from purchasing the particular product of the primary employer with whom the Union had a primary dispute, did not constitute coercion as defined in this Section of the Act.[8] The Court drew a distinction in this regard between consumer picketing in support of a product boycott and consumer picketing which sought to enforce a total boycott of the neutral employer's premises:

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employers' purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. (377 U.S. 58, at 72)

In the present case, Respondents' activities were directed towards the institution of a consumer boycott of all products distributed by the companies it listed as advertising on KXTV. In these circumstances, it is clear that its appeals and related conduct were not limited to the product in dispute, whether that product be viewed as the physical product advertised over the facilities of KXTV,[9] or as merely the advertising component added to

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[8] *N.L.R.B.* v. *Fruit and Vegetable Packers and Warehousemen, Local 760, et al (Tree Fruits)*, 377 U.S. 58.

[9] Compare the discussion, *infra*, as to the nature of the product produced by KXTV for purposes of applying the proviso to 8(b)(4).

the product by KXTV's efforts.[10] By failing to limit its activities to the product in dispute, Respondent exceeded the limited privilege to engage in product boycotts which the *Tree Fruits* decision recognized. Accordingly, apart from the consideration of the effect of the publicity proviso discussed hereafter, we find that such conduct clearly constitutes threats, restraint, or coercion within the meaning of Section 8(b)(4)(ii) of the Act.

Having found that the actions previously described are coercive, we now consider whether they were protected by the proviso to Section 8(b)(4), and conclude, as we did in our earlier decision, that they were so protected.

Since the remand by the Court of Appeals for the Ninth Circuit, the Supreme Court has considered the scope of the proviso in *N. L. R. B.* v. *Servette, Inc.*, 377 U.S. 46. In *Servette*[11] we had followed our earlier ruling in *Lohman Sales Co.*, 132 NLRB 901, that products "produced by an employer" included products distributed by a wholesaler with whom the primary dispute existed. The Court of Appeals for the Ninth Circuit, applying its decision in the instant case that the proviso only covered the manufacturer of a physical product, reversed the Board (310 F. 2d 659). The Supreme Court, in turn reversed the Ninth Circuit, and approved of the Board's interpretation pointing out that:

> The proviso was the outgrowth of a profound Senate concern that the union's freedom to appeal to the public for support of their case be adequately safeguarded. . . . It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor. . . . There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage

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[10] Respondent's activities were not and could not have been confined to a boycott of only the advertising component.

[11] 133 NLRB 1501.

than the prohibition to which it is an exception. . . . (377 U.S. 46, at 55).

While *Servette* and *Lohman* both involved wholesalers of a physical product, we are of the opinion that the Supreme Court's decision in *Servette* sustains our holding, enunciated in *Lohman,* that "producer," as used in the proviso, encompasses anyone who enhances the economic value of the product ultimately sold or consumed, i.e., for the purposes of the proviso, no distinction is drawn between processors, distributors and those supplying services. Since the Court has stated that the protection of the proviso is not "any narrower in coverage than the prohibition to which it is an exception," and since the prohibition of Section 8(b)(4)(B) covers the performance of services as well as processing or distribution of physical products, it follows that the proviso likewise applies to the performance of services.

Accordingly, with all due respect to the Ninth Circuit's contrary view in this case,[12] we adhere to our original conclusion that KXTV, by the addition of its services (advertising) to the products involved here, is a "producer" within the meaning of the proviso. Thus even though the handbilling and related conduct calling for a consumer boycott of secondary employers was coercive, it nevertheless was protected by the proviso to Section 8(b)(4) of the Act.[13]

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[12] In a decision issued October 29, 1964, *N.L.R.B.* v. *Joint Council of Teamsters, No. 38, et al,* 338 F. 2d 23, 26, footnote 3, the Ninth Circuit has itself recognized that the Supreme Court's decision in *Servette* extends the proviso to encompass "services."

[13] Our conclusion is buttressed by the Supreme Court's observation in *Tree Fruits* that by the proviso, Congress authorized:

> . . . publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him, but not such publicity which has the effect of cutting off his deliveries or inducing his employees to cease work. (377 U.S. 58, at 70-71).

Having concluded that the intervening decisions of the Supreme Court in *Servette* and *Tree Fruits* support our original holding, with all due respect to the Court of Appeals, we find it unnecessary to reach and pass upon the second question raised in its remand, namely, whether or not the actions were protected by the free press and free speech provisions of the first Amendment to the Constitution. That issue would arise only if we found the actions were coercive and not protected by the proviso to that section of the Act.[14]

In summary, we have found that, with but one exception, Respondents' conduct did constitute threats, restraint or coercion within the meaning of Section 8(b)(4)(ii)(B) of the Act, but that it is not violative of the Act because of the protection afforded by the publicity proviso. We accordingly reaffirm our original dismissal of the complaint.

Dated, Washington, D. C., December 16, 1964.

FRANK W. MCCULLOCH, *Chairman*
BOYD LEEDOM, *Member*
JOHN H. FANNING, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[14] The Board has consistently taken the position that as an administrative agency created by Congress it will presume the constitutionality of the Act it is charged with administering, absent binding court decisions to the contrary, *Milk Drivers and Dairy Employees, Local 537 (Sealtest Foods)*, 147 NLRB No. 35; *Chauffeurs, Teamsters, and Helpers General Local Union No. 20 (Milwaukee Cheese Co.)*, 144 NLRB 826; *Truck Drivers Local 413 (Patton Warehouse)*, 140 NLRB 1474. Moreover, the Supreme Court in *Tree Fruits* demonstrated the propriety of avoiding the constitutional problem in this difficult area, if possible. Our interpretation of the proviso does so.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17698

GREAT WESTERN BROADCASTING CORPORATION, d/b/a KXTV, *Petitioner,*

NATIONAL LABOR RELATIONS BOARD, *Respondent*

and

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SAN FRANCISCO LOCAL AND NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, LOCAL 55, *Intervenors.*

Decree

Before: BARNES, HAMLEY and JERTBERG, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of Great Western Broadcasting Corporation, d/b/a KXTV, filed December 29, 1961, to review an order of the National Labor Relations Board, issued by it on December 27, 1961, against the petitioner.

The Court heard argument of respective counsel on July 11, 1962 and has considered the briefs and transcript of record filed in this cause. On November 9, 1962 the Court being fully advised in the premises handed down its decision. In conformity therewith, it is hereby,

ORDERED, ADJUDGED AND DECREED that the order of the said National Labor Relations Board under review be and hereby is reversed and that this cause be and hereby is remanded to that agency for consideration, on the present record, with such augmentation thereof, if any, as it may deem appropriate, of the additional questions, raised by intervenors as noted in the opinion of this Court.

FRANK H. SCHMID
Clerk

Filed and Entered Dec. 17, 1962

[PART OF APPENDIX C]

319 F. 2d 591

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17698

Nov. 9, 1962

GREAT WESTERN BROADCASTING CORPORATION, d/b/a KXTV, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

and

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SAN FRANCISCO LOCAL AND NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, LOCAL 55, *Intervenors.*

On Petition for Review of an Order of the National Labor Relations Board

[593] Before: BARNES, HAMLEY and JERTBERG, Circuit Judges.

HAMLEY, Circuit Judge:

This is a proceeding to review an order of the National Labor Relations Board dismissing an unfair labor practice complaint. The case involves an attempt by two unions, assertedly using coercive methods, to force several companies to cease advertising on a television station with which the unions were having a labor dispute. It was charged that the union activity was proscribed by section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended (Act), 29 U.S.C., § 158(b)(4)(ii)(B).

The charging party, and petitioner here, is Great Western Broadcasting Corporation, which operates tele-

vision station KXTV in Sacramento, California. The unions, which were respondents in the Board proceedings and are intervenors here, are American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

The facts are not in dispute. A primary labor dispute between the unions and KXTV resulted in a strike which commenced on September 26, 1960. Picketing of the KXTV premises ensued. Among the advertisers who then regularly used the services and facilities of KXTV for advertising purposes were John Geer Chevrolet Company (Geer), Capitol Studebaker Company (Capitol), Rainbo Baking Company (Rainbo), Shell Oil Company (Shell), Burgermeister Brewing Corporation (Burgermeister), and Handy-Andy. Each of these advertisers is an employer engaged in commerce or in an industry affecting commerce within the meaning of the Act.

In an effort to win their labor dispute with KXTV, the unions took the following action:

> (1) had committees of the unions call upon all of the advertisers who used KXTV for the purpose of requesting them to discontinue their patronage of the station and assist the unions in their cause against KXTV;
>
> (2) had a committee call upon Capitol for the same purpose, in the course of which this advertiser was told that if it continued to advertise on KXTV the Labor Council would undoubtedly print the name of Capitol in the Labor Bulletin as not supporting the strike;
>
> (3) mailed to all KXTV advertisers a letter setting forth the [594] background of the strike and requesting discontinuance of advertising over the station,

warning that failure to do so would bring an adverse economic reaction;[1]

(4) printed and distributed four thousand handbills listing KXTV as "unfair," and naming Geer, Rainbo, Shell and Burgermeister as advertisers who nevertheless continued to utilize the services of the station, such distribution being made in front of KXTV, at the Sacramento Labor Temple, and at various Sacramento grocery stores which handled Rainbo Bread and Burgermeister beer;[2]

(5) sent a letter to the San Francisco Labor Council asking the Council to return its Shell credit card to that company and to request the members of affiliated unions to do likewise;

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[1] This letter contained these statements:

"... Any advertiser on this station while it is being operated by strike breakers will give the impression of taking sides in this dispute....

"... We are about to launch an intensive campaign to bring the facts behind this dispute to the attention of the entire population covered by this station. We are sure you recognize the obvious fact that many members of organized labor and their families, and those sympathetic to the cause of organized labor, will have long-lasting resentment against any product or sponsor who takes sides in this dispute by advertising on this station during the course of this worthy strike.

"If you are currently advertising for clients on this station, or have any advertising projected for the next six months, we are sure you will wish to change your plans to avoid the inevitable adverse reaction...."

[2] Copies of this leaflet were also found stuffed between loaves of bread at a supermarket supplied by Rainbo. The leaflet carried this note:

"This statement is directed to the customers of the above advertisers. It is not a request to employees to refuse to pick up, deliver or transport, or to refuse to perform any service."

(6) sent a later letter to the San Francisco Labor Council listing fourteen companies who were then advertising on station KXTV, with the observation that "any aid" the Council and its affiliated members "can give in this sponsor area" would be appreciated;

(7) showed to the President of Handy-Andy, with an appeal to stop advertising on KXTV, a copy of a newly-printed leaflet which gave the background of the labor dispute with KXTV, named Handy-Andy as a company which continued to do business with KXTV, and added the comment: "We think you will agree that this continued association is contrary to the best interests of working people and the public";[3]

(8) telephoned the general manager of Geer and, in conjunction with an appeal to have Geer cease advertising on KXTV, informed him that a new leaflet was being printed naming Geer as a sponsor still advertising on KXTV and that if Geer continued to do business with the station, this leaflet would be passed out in front of Geer's establishment, among other places.

As a result of the described union activity one KXTV advertiser was subjected to a secondary boycott and at least two other advertisers ceased doing business with that station.[4]

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[3] One thousand of these leaflets were printed, and a like number of ten similar leaflets were printed, each naming a different company which continued to advertise on KXTV. None of these leaflets, however, were distributed.

[4] As a result of the first letter sent by the unions to the San Francisco Labor Council, Shell received numerous letters enclosing Shell credit cards. The individual writers explained that they would pick up their cards in the future when Shell discontinued its advertising over KXTV.

On October 10, 1960 Capitol cancelled its $8,500 advertising contract with KXTV for the duration of the strike. In a letter

[595] There was no picketing, or threat to picket, the place of business of any of the advertisers. There was no physical violence or threat of physical violence. The handbills were truthful and their distribution was peaceful. None of the described union activity was designed to bring about a work stoppage by employees of any advertiser, and none had that effect.

On these facts the Board, with one member dissenting, held that the described union activity was protected by the publicity proviso at the end of section 8(b)(4) of the Act.[5]

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of explanation, Capitol told KXTV that after its televised commercial one evening, the company's phones were "jammed" from 7:00 to 9:30 P.M. by callers claiming to be union people. These callers criticized Capitol for not supporting the strike and, in substance, said that for this reason they would not do business with the company.

On November 10, 1960, and as a result of the pressure described above, Rainbo cancelled a $26,000 advertising contract which it had entered into with KXTV a month previously.

[5] Section 8(b)(4) provides in pertinent part:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—

"B. forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, . . .

* * * * *

"*Provided further*, that for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of

The complaint was therefore dismissed in its entirety.[6]

Petitioner here challenges the Board conclusion that the publicity proviso is applicable under the facts of this case. It contends that since that proviso pertains only to publicity concerning a "product" or "products" which are "produced" by a primary employer and which are thereafter "distributed" by another employer, the service rendered by a television station is not included therein.[7]

The Board, as respondent on this review, joins issue on this point. The two unions, which were respondents in the agency proceeding and are intervenors here, support the Board's position that the publicity proviso is applicable and protects the union activity in question.

In determining which of these conflicting constructions of the proviso is correct, the critical statutory words, none of which are defined in the Act, are "product," "produced," and "distributed."

In its broadest sense, the term "product" denotes anything which is produced. Since economic activity includes the rendition of services, it is appropriate, where the context otherwise permits, to refer to a completed service as a "product."

In this case, however, as all seem to recognize, the context in which the term "product" appears in the proviso

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inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution; . . ."

[6] A preliminary injunction against the unions which the Board had obtained, reported *sub nom. Brown* v. *American Federation of Television & Radio Artists, San Francisco Local,* N.D. Cal., 191 F. Supp. 676, was thereafter dismissed.

[7] In support of the same proposition, the National Association of Broadcasters has filed an amicus curiae brief in this court.

precludes the view that the television service rendered by KXTV, considered alone, is a "product" within the meaning of the proviso.[8] One reason for this con- [596] clusion is the fact that in two other places in section 8(b)(4), the term "services" is used in contradistinction to tangible articles.[9] It is likely that Congress would have followed this same format if it had intended the publicity proviso to apply with regard to a primary employer who renders services instead of manufactures tangible articles.

A second and still more persuasive reason why television advertising service, considered alone, could not be a "product" within the meaning of the publicity proviso lies in the fact that the only "products" there referred to are those which are capable of being "distributed" by "another employer." An advertising service rendered by a television station is not capable of being so "distributed," least of all by an employer whose only relationship with the station is that of an advertiser.

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[8] In holding that the "privilege" which a television network sells to a sponsor is not a "commodity" within the meaning of sections 2(a) and 3 of the Clayton Act, 15 U.S.C., sections 13(a), 14 it has been held that the most reliable guide to the meaning of the word is the context in which it is employed. *Columbia Broadcasting System* v. *Amana Refrigeration, Inc.*, 7 Cir., 295 F. 2d 375, 378.

[9] In section 8(b)(4)(i), the following words are used: ". . . to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities *or to perform any services;* . . ." (Emphasis supplied.) Near the end of the publicity proviso itself, the following language appears: ". . . to refuse to pick up, deliver, or transport any goods, *or not to perform any services,* . . ." (Emphasis supplied.) In section 8(b)(4)(i)(ii)(B), while the word "services" is not used, the following language indicates the same differentiation between a primary employer who produces, processes or manufactures a tangible article, and one who does not; ". . . to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer processor, or manufacturer, *or to cease doing business with any other person,* . . ." (Emphasis added.)

The Board, however, believes that it has overcome this difficulty by holding that it is not the television service of KXTV, standing alone, which is the "product" here, but the item being advertised on that station, KXTV becomes one of the "producers" of the items advertised, the Board reasons, "by adding its labor in the form of capital, enterprise and service . . ." to such items.

It may be noted, however, even before testing the correctness of this line of reasoning, that it leads to the rather remarkable conclusion that a television station can be a producer of automobiles, bread, gasoline and beer.[10]

In reaching its conclusion the Board followed its decision rendered on October 31, 1961, in *Middle South Broadcasting Co.,* 133 NLRB No. 1698. The primary employer in that case was a radio broadcasting station. In turn, the decision in *Middle South Broadcasting* was based upon the Board's decision rendered on August 10, 1961 in *International Brotherhood of Teamsters, etc.* (*Lohman Sales Company*), 132 NLRB 901. There the primary employer was a wholesale distributor of cigarettes, cigars, other tobacco products, candy, and related products. The issue was whether a wholesale distributor is a producer of products within the meaning of the proviso.

In the *Lohman* case the Board first determined that, so far as human effort is concerned, labor is the prime requisite of one who produces.[11] The Board then reasoned that

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[10] It also requires one to regard the advertisers of those products, who either manufacture the article themselves or distribute articles manufactured by companies having no connection with the television station, as the "distributors" of articles "produced" by a television station.

[11] In reaching this conclusion the Board relied upon dictionary definitions, primarily upon a definition of "product" to be found in A. Meriam Webster, Webster's New Collegiate Dictionary, 1959, and an explanation of the term "production" contained in Black's

not only the actual manu-[597] facturer, but also the wholesaler, adds "labor in the form of capital, enterprise, and service to the product he furnishes the retailers." "In this sense, therefore," the Board stated, "Lohman, as the other employers who 'handled' the raw materials of the product before him, is one of the producers of the cigarettes distributed by his customers. . . ."

In the Board's contemplation then, the "production" of cigarettes includes every phase of activity, beginning with the combination of tobacco seed, earth and water, and ending with the ready availability of cigarettes to the smoking public. Each employer in the process of production begins with what, to him, are raw materials, and "produces" what to him is a finished "product." The wholesale distributor (or in our case the television station) "handles" cigarettes which are not yet readily available to the members of the smoking public in the same sense as the manufacturer "handles" raw tobacco which has not yet become cigarettes. In this sense the wholesale distributor and the television station are producers of products capable of being distributed by their successors in the production process.

As we have indicated earlier in this opinion, the terms "product," "produce" and "production" may be construed this broadly if they are not found in a more restrictive context. But, as we have also indicated earlier, the

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Law Dictionary, Fourth Edition, West Publishing Co., 1951, pages 374-375. The latter definition is as follows:

> "In political economy. The creation of objects which constitute wealth. The requisites of production are labor, capital, and the materials and motive forces afforded by nature. Of these, labor and the raw materials of the globe are primary and indispensable. Natural motive powers may be called in to the assistance of labor and are a hedp, but not an essential, of production. The remaining requisite, capital, is itself the product of labor. Its instrumentality in production is therefore, in reality, that of labor in an indirect shape. Mill, Political Economy; Wharton."

context in which the words "produce" and "product" are found indicates that in using them Congress was referring to one kind of economic activity and its result rather than to all economic activity and its result.

The Board proceeds on the assumption that Congress intended "product" to encompass the results of all forms of economically productive labor. Yet it concedes that a television station's product is not advertising but the subject of the advertising. So long as the subject of the advertising is a tangible article these propositions need not lead to an incongruous result.

But if, instead of a tangible article, the subject of the television advertising is a service, such as banking or cleaning, an internal inconsistency at once appears.[12] It derives from the fact that while television advertising service, as such, is not to be regarded as a "product" under the proviso, because it is not capable of being distributed, a service being advertised on television is to be regarded as a "product," although it is equally incapable of being distributed.

Thus, while the Board adopts a broad construction of the term "product" in order to obviate the incongruity of saying that a television advertising service is capable of being distributed, we find that, after all, the underlying difficulty has not been avoided. The Board is still saying that a service, though one being advertised rather than the television service itself, is a "product," although not capable of being distributed.

Only now the Board has involved itself in the additional difficulty of saying that a television station is a "producer"

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[12] There is evidence in the case before us that the unions directed informational activity against one bank and one dry cleaning establishment. Since neither the bank nor the cleaners was found to be engaged in commerce or an industry affecting commerce, however, the union's activity with respect to them is not in issue here.

of banking and cleaning services which are "distributed" by banks and cleaners. If the capacity for distribution require- [598] ment is to be ignored it might as well be at the outset, with reference to television advertising service, thereby avoiding the futile involvements inherent in the Board's broad construction.

The Board expressed the view in *Lohman* that unless its concept were accepted, it must follow that "vast numbers of our working population produce nothing."[13] The weakness of this argument lies in the assumption that if, for the purposes of the proviso, the term "product" must be limited to a tangible article it must follow that even in a broad economic sense, only those engaged in manufacturing tangible articles are "producers."

The two frames of reference should not be confused. For the limited purposes of the proviso only those who deal with tangible articles are "producers," but in general economic theory, all who engage in useful labor, whether or not directly related to tangible articles, are "producers." In order to hold that a television station is not, within the meaning of the proviso, the producer of automobiles which it advertises, it is not necessary to conclude that the engineers, announcers, advertising men and others employed by the station are not "productive." They perform a television advertising service, just as the employees of Lohman perform a distribution service. But since the fruit of their labor is not capable of physical distribution by others, it is not a "product" as that term is used in the proviso.

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[13] Developing this idea, the Board said in *Lohman:*

> ". . . Their thought, labor, or business enterprise is not a 'product.' We do not believe that the plain meaning of the words 'product' and 'produced' requires the Board to draw an uncertain line between those employers engaged essentially or only incidentally in the fabrication of products; between those employers who create a new product or embellish an old one; between products of the imagination and those that can be seen, touched, or smelled."

The Board believes that the legislative history indicates that the result reached in *Lohman, Middle South Broadcasting* and this case, is what Congress really intended.

We very much doubt that the statutory language of the publicity proviso is ambiguous with regard to the meaning of "produced," thereby warranting reference to legislative history. While this term is not defined in the Act, the context indicates to us that, in the proviso, Congress was referring to the activity of a primary employer in applying capital, labor and enterprise to effect the conversion of raw materials in his possession into a more finished tangible article.

In section 8(b)(4)(i)(ii)(B), which contains the only statutory reference to the kind of employers who can be the creators of "products," as that term is used in the Act, the words used are: " . . . the products of any other producer, processor, or manufacturer . . . "[14] The words "processor" and "manufacturer" refer to persons engaged in a physical creative activity, and it is reasonable to believe that the word "producer" was used in the same sense. There is no reason to believe that "produced" was used in the proviso in any different sense than "producer" was used in section 8(b)(4)(i)(ii)(B).

But, assuming that resort to legislative history is appropriate, we believe it to be inconclusive as to the point under discussion.

It is true that this history indicates that some Senators and Congressmen expressed the view that inclusion of the publicity proviso was necessary because without it, section 8(b)(4)(ii)(B) might outlaw forms of publicity such as leaflets, radio broadcasts, and newspaper advertisements,

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[14] The pertinent part of section 8(b)(4) is quoted in note 5.

thereby impinging upon free speech.[15] The Board argues, in effect, that there is no reason to believe [599] that Congress was less interested in preserving free speech where the primary employer is a distributor, or a radio or television operator, than when he is a manufacturer of tangible articles.

If all that Congress really had in mind in adding the publicity proviso was to implement, with respect to leaflets, broadcasting and newspapers, the free speech guarantee of the First Amendment, the proviso was not needed and would have to be regarded as surplusage. Section 8(c) of the Act, 29 U.S.C. § 158(c), already in effect, provided complete implementation of the First Amendment in this regard.[16] As intervenors in this case concede, section 8(c) is "no more than a restatement of the principle embodied in the First Amendment," quoting *NLRB* v. *LaSalle Steel Co.*, 7 Cir., 178 F.2d 829, 835.

Section 8(c), however, does not protect, under the guise of free speech, publicity activity which is associated with

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[15] When the proposed 1959 amendment of section 8(b)(4) got to conference without such a proviso, Senator Kennedy and Representative Thompson expressed this concern. (105 Cong. Rec. 16591; II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 [Leg. Hist.] 1708). The proviso was thereafter added as a "clarification." (105 Cong. Rec. 18022; II Leg. Hist. 1712). In discussing the addition of this proviso, Senator Kennedy explained that, without the proviso, the amendment of section 8(b)(4) would have prohibited "the handing out of handbills or even taking out an advertisement in a newspaper." (105 Cong. Rec. 17720, 17898-17899; II Leg. Hist. 1388-1389, 1432). Senator Douglas and Representative Udall similarly expressed the view that the proviso was necessary to protect free speech. (105 Cong. Rec. 19904, 18135; II Leg. Hist. 1834, 1722).

[16] Section 8(c) reads:

> "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

coercion, since that subsection ends with the words, " . . . if such expression contains no threat of reprisal or force or promise of benefit." Thus if Congress desired to protect any kind of publicity which was associated with coercion, it was necessary to add statutory language which did not contain the limitations built into section 8(c). Apparently Congress did want to protect some publicity of this kind, and so solved the problem by adding the publicity proviso.[17]

This demonstrates, we think, that the meaning of "produced," as used in the publicity proviso, is not to be given an all-inclusive construction on the theory that Congress was trying to guarantee free speech. On the contrary, it suggests that since the publicity being protected by the proviso could be of a kind associated with threats, coercion, or restraint. Congress did not intend an expansive exception but chose words which would have limited application.

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[17] The Board has itself held in *Lohman, Middle South Broadcasting Co.* and the case now before us, that the publicity proviso excepts certain publicity although coercion may be involved. The statutory authority for this is to be found in section 8(b)(4)(ii), quoted in note 5.

The Board said in *Lohman,* at page 904:

> ". . . While such conduct otherwise might constitute restraint and coercion, we agree with the conclusion of the Trial Examiner that Respondent's hand-billing in this case was protected by the proviso to Section 8(b)(4)."

The Board reached a similar conclusion in its *Middle South Broadcasting Co.* decision, saying, at page 1705:

> ". . . We also agree with his [Trial Examiner's] finding that, unless protected by the proviso to Section 8(b)(4), Respondent's circulation and distribution of the 'Do Not Patronize' leaflets urging a consumer boycott of secondary employers still advertising on WOGA, would constitute 'restraint or coercion' within the meaning of Section 8(b)(4)(ii)(B) and a violation of that section."

In the case now before us the Board, in its decision, makes reference, with approval, to its holding in *Lohman* that publicity activity may be protected by the publicity proviso, although such activity "might constitute restraint and coercion. . . ."

Had Congress intended to except publicity concerning primary employers whose own products were of an intangible nature not capable of "distribution," the [600] proviso could have been much simpler than that which was enacted. It would have been sufficient to say that nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, "for the purpose of truthfully advising the public (including consumers) that *an establishment is operated,* or goods are produced or distributed, by an employer engaged in a labor dispute. . . . " (Emphasis supplied.)

In fact these identical words were proposed in a Senate Resolution, instructing the Senate conferees to S. 1555, offered in the Senate on August 28, 1959, by Senators Kennedy, McNamara, Morse and Randolph.[18] This resolution was not adopted.

Unlike the language proposed in the resolution which was not adopted, the statutory proviso does not include among designated primary employers, those who "operated" establishments or "distributed" goods. The only primary employers referred to in the enacted proviso are those who produce a product or products. This class of employers is further defined and restricted by the additional provision that the employer must be one who produces products capable of distribution.

It seems unlikely that an easy way of expanding the coverage of the proviso would have been rejected and detailed limiting provisions (which under the Board's reasoning become surplusage) would have been developed, if it had been intended that the proviso was to have the broad coverage given to it by the agency.[19]

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[18] II Leg. Hist. 1383.

[19] We do not, however, agree with petitioner that significance is to be attached to the fact that, during the Congressional debates, the proviso as it was finally enacted was referred to only as one which would permit publicity concerning "goods" or "products." A close reading of the legislative history leads us to believe that

The foregoing considerations lead us to conclude that the publicity proviso which is a part of section 8(b)(4)(B) does not protect publicity to the effect that television service is rendered by a station with whom the labor organization has a primary dispute, which service is being utilized by other employers.

Intervenors argue, however, that even if the publicity proviso is inapplicable there are two other reasons why the Board order should be sustained. These are: (1) Section 8(b)(4)(ii)(B) relates only to union activity which tends to "threaten, coerce, or restrain," and the activity here in question was not of that kind; and (2) the union activity involved in this case is protected by the free speech and free press provisions of the First Amendment to the Federal Constitution.

The Board relied on neither of these grounds in entering its order here under review. With regard to the "coercion" argument, a determination is complicated by the fact that eight separate and distinct union actions are drawn into question. Some may be coercive and some may not.

In our view, the Board should make a determination as to the merits of these two additional arguments advanced by intervenors before this court is called upon to consider them.

The Board order under review is reversed and the cause is remanded to that agency for consideration, on the present record, with such augmentation thereof, if any, as it may deem appropriate, of the additional questions raised by intervenors, as noted above.

(Endorsed) Opinion Filed Nov. 9, 1962.

FRANK H. SCHMID, Clerk.

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reference to "goods" and "products" produced by non-union or struck "manufacturers" served only as an exemplification of the typical secondary boycott situation rather than as a conscious expression of Congressional purpose.

APPENDIX D

134 NLRB 1617

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 20-CC-234

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SAN FRANCISCO LOCAL

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, LOCAL 55

and

GREAT WESTERN BROADCASTING CORPORATION, d/b/a KXTV

Decision and Order

On May 4, 1961, Trial Examiner Howard Meyers issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief and the Charging Party filed a brief in support of the Intermediate Report.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and finds merit in the Respondents' exceptions. Accordingly, the

Trial Examiner's findings, conclusions and recommendations are adopted only to the extent that they are consistent herewith.

The Facts[1]

A primary dispute between the Respondents and KXTV resulted in a strike which commenced about the end of September 1960, and picketing of the KXTV premises ensued therefrom. John Gear Chevrolet, hereinafter Gear, Capital Studebaker, hereinafter Capital, Rainbow Bread Company, hereinafter Rainbow, Shell Oil Company, hereinafter Shell and Burgemeister Beer, hereinafter Burgemeister and Handy Andy were advertisers who regularly used the services and facilities of KXTV to promote the sales of their products. About September 27, Respondents sent out a general request through committees to all of the advertisers who used KXTV to discontinue their patronage of the radio station and to assist the Respondents in their cause against KXTV.

On September 29 Respondents also mailed to the sponsors a letter setting forth the background of the strike and again requested the sponsors to discontinue advertising over station KXTV. As a result of pressure ensuing from this campaign Capital canceled its advertising contract with KXTV and in a letter to the television station explained that its phones were jammed with people stating that they would not buy Capital's cars because they continued to advertise over the station's facilities.

Thereafter on October 25 Respondents caused to be printed a leaflet[2] in which Gear, Rainbow, Shell and Burgemeister were named as sponsors who continued to use the

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[1] The facts are set forth as found by the Trial Examiner based on stipulations submitted at the hearing and, therefore, not excepted to. The Respondents did except to the failure of the Trial Examiner to set forth additional stipulated facts. These are added.

[2] This is the leaflet No. 1 set forth in full in the Intermediate Report.

facilities of KXTV despite the Respondents' requests that the sponsors refrain therefrom. This handbill was distributed at the picketline in front of KXTV, at the Sacramento Labor Temple, and at various Sacramento grocery stores who handled Rainbow Bread and Burgemeister Beer. Copies of the leaflet were also found stuffed between loaves of bread at one of the supermarkets supplied by Rainbow. As a result of this pressure, on November 10 Rainbow canceled its contract with KXTV.

On October 31 the Respondents sent a letter to the San Francisco Labor Council[3] in which the Respondents requested that the Labor Council ask its members and affiliated unions to aid Respondents by returning their Shell Oil Company credit cards because Shell continued to advertise through the facilities of KXTV. As a result of this request Shell received numerous letters inclosing Shell credit cards in which the individual writers explained that they would pick up their cards in the future when Shell discontinued its advertising over KXTV.

On November 10 the Sacramento Central Labor Council asked Shell directly by letter to discontinue use of the facilities of KXTV. Apparently Shell did not respond to this pressure.

On December 13 Respondents ordered additional copies of 11 separate leaflets naming 11 sponsors who continued to use KXTV's facilities stating that the firms named did not merit the patronage of the public to whom the handbill was addressed because the firms continued to do business with KXTV.[4] Although copies of these leaflets were not circulated, a copy was shown by the Respondent to Handy Andy's president and at the same time an appeal was made to Handy Andy to discontinue advertising on KXTV. On

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[3] This letter of October 31 is also set forth in full in the Intermediate Report.

[4] The Intermediate Report refers to this leaflet as Leaflet No. 2 and sets forth the leaflet in full.

December 17 Respondents telephoned Gear's general manager and threatened that a leaflet was being printed in which Gear would be named as an unfair advertiser unless Gear discontinued using KXTV's facilities. Thereafter under date of December 27 Respondents again appealed to the Labor Council to enlist the Labor Council's support again in their strike with KXTV requesting that the Council's constituents' members refuse to purchase the products of the list of sponsors included therein who were still advertising on KXTV. As a result of this letter on January 6, 1961, a synopsis of the San Francisco Labor Council's meeting of January 6, 1961, was mailed to everyone on the mailing list including member unions and individual members in which it was again requested that these people discontinue the purchase of the products or the use of services of Gear, Blue Seal Bread, Shell Oil, Hamms Beer, Continental Baking, Dr. Mann Optometrists, Baker Moving and Storage and Crocker-Anglo Bank all of whom were still advertising on KXTV.

There was no picketing at places of business of any of the advertisers, the picketing being confined to KXTV premises. The handbills, hereinbefore mentioned, specifically stated that the Respondents did not request employees to cease performing services for their respective employers. The General Counsel makes no contention to the contrary, and in fact concedes in a stipulation submitted at the hearing that there was no picketing at any of the sponsors nor was there any work stoppage as a result of the publicity. Nor is there any contention that the leaflets were untruthful, that the picketing of KXTV was unlawful, that the handbills constituted picketing, or that the conversations had with the various sponsors before the occurrences of handbilling constituted threats to picket. The Respondents admitted that in addition to handbilling, union officials informed members at meeting halls and members of the public at other places that certain advertisers were continuing to advertise on station KXTV, during the strike

and asked them not to patronize these advertisers; that union officials orally requested the advertisers to stop advertising before mentioning the publicity of handbilling, and the General Counsel is not contending that such oral requests standing by themselves are unlawful. It was conceded that there were no threats of physical violence or work disturbances and that at no time was there any action taken by the Respondents' officers with respect to employees of any employer aside from KXTV as to continuity of work. Nor does the General Counsel contend that it was unlawful under the Act for advertisers voluntarily to withdraw their advertising from station KXTV during the strike nor to do so upon oral request of union officials not accompanied by threats, restraint or coercion.

Moreover the General Counsel does not contend nor was there any proof that any member of the public other than the sponsors or advertisers was threatened, restrained or coerced by the Union in connection with the distribution of the handbills, nor does the General Counsel contend or contest the fact that the Union left it entirely up to the voluntary choice of the public other than the sponsors or advertisers as to whether or not they wished to withhold patronage from advertisers who continued to use the facilities of KXTV. Finally, the General Counsel does not contend that the distribution of the handbills was other than peaceful.

However, the General Counsel does contend, as does the Charging Party, that the handbilling was not protected under the proviso to Section 8(b)(4) which protects publicity other than picketing because the Respondents' conduct was designed to inflict economic injury upon and to restrain employers and not merely to peacefully convey facts of the primary dispute to the public. They further contend that in any event the said proviso is not applicable here because KXTV, the primary employer, did not produce products which were distributed by the secondary employers abovenamed within the meaning of the proviso.

The Trial Examiner, without explication of his reasons therefor, concluded on the foregoing facts and contentions that the conduct of the Respondents constituted violations of Section 8(b)(4)(ii)(B). We do not agree with his conclusions.

Only recently, the Board in the *Lohman* case[5] held that although handbilling and threats to handbill in a manner similar to that set forth above might constitute restraint and coercion, nevertheless, such conduct was protected by the proviso to Section 8(b)(4) which specifically permits truthfully advising the public, including consumers and members of labor organizations, that a product or products are produced by an employer with whom a labor organization has a primary dispute. Under these circumstances, we conclude, that the handbilling and threats to handbill as set forth above were protected activities and therefore not violative of the Act provided, however, that the named proviso is otherwise applicable to the situation presented. Nor can we perceive of any reason to find the conduct unprotected because some of the handbills were found within the premises of a distributor of the products of a sponsor who advertised over KXTV. The literature was truthful, no work stoppage resulted, and the purpose of the distribution of the handbills in this fashion was to inform the public of truthful facts. Additionally, as we similarly held in the *Lohman* case, since the distribution of such handbills is protected by the proviso so also were the threats by the Respondents to Gear and to Handy Andy that handbills would be distributed unless these employers ceased advertising over the facilities of KXTV.

We come then to the issue of whether the proviso to Section 8(b)(4) is otherwise applicable to the situation presented in this case. As stated above, it is contended that the proviso is not applicable here because KXTV provides a service and does not produce a product within the mean-

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[5] *Lohman Sales Company*, 132 NLRB No. 67, issued August 10, 1961.

ing of the proviso. We have recently dealt with a similar issue involving a broadcasting company as a primary employer in the *Middle South Broadcasting* case.[6] There we held that the publicity proviso is applicable because the primary employer radio station, by adding its labor in the form of capital, enterprise and service to the products which it advertises for secondary employers becomes one of the producers of the product which it advertises. And, of course, the secondary employers who are retail distributors of the products clearly distribute such products within the meaning of the proviso. Accordingly, we find for these reasons that the proviso is applicable here and that the distribution of the handbills was protected thereby.

We come finally to the question of whether requests to members of the Labor Council not to purchase the products or use the services of advertisers who continue to use the facilities of KXTV were unlawful. We need but to resort once again to the wording of the proviso for the answer to this contention. The proviso specifically states that the request not to use a product is protected where the purpose is to truthfully advise the public, including consumers and members of *a labor organization,* that a product or products are produced by an employer. It is therefore clear that the Act specifically enables a union which is involved in a primary dispute to seek assistance in such dispute from members of the public including members of a labor organization. Therefore, we conclude that the requests of the Central Labor Council that its members not use the products of the named advertisers was fully protected as permissible dissemination of truthful information.

Accordingly, we find that the Respondents' leaflet circulation and distribution and threats to circulate and distribute were protected by the publicity proviso to Section 8(b)(4), and therefore were not violative of Section 8(b)(4)(ii)(B).

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[6] *Middle South Broadcasting Co.*, 133 NLRB No. 165.

As we have found that the Respondents' leaflet distribution and oral and written requests were not unlawful, we shall dismiss the complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C., Dec. 27, 1961.

FRANK W. McCULLOCH,
Chairman

JOHN H. FANNING,
Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

PHILIP RAY RODGERS, *Member*, dissenting:

In *Middle South Broadcasting Company*, 133 NLRB No. 165, I dissented from my colleagues' conclusion that the publicity proviso to Section 8(b)(4) protected handbilling where the primary dispute involved a radio station. Here, too, as the primary Employer, KXTV, a television station, produces no products, the proviso is unavailing as a defense. Accordingly, I would find the Respondent's threats to handbill and its subsequent handbilling to be violative of Section 8(b)(4)(ii)(B) of the Act.[7]

Dated, Washington, D. C., Dec. 27, 1961.

PHILIP RAY RODGERS,
Member

NATIONAL LABOR RELATIONS BOARD

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[7] In view of my conclusion that Respondent's threats and handbilling violate Section 8(b)(4)(ii)(B) of the Act and that an appropriate remedy would require Respondent to cease and desist from such conduct, I find it unnecessary to pass upon the further question whether the Sacramento Labor Council's implied threat to place the Shell Oil Company on its "We Do Not Patronize" list would otherwise qualify as "publicity" within the meaning of the proviso.

APPENDIX E

National Labor Relations Act, as amended (29 U.S.C. § 141 *et seq.*)

* * * * *

Unfair Labor Practices

* * * * *

"Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 8(e);

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work;

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1290

GREAT WESTERN BROADCASTING CORPORATION
d/b/a KXTV, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N. W.
Washington, D. C. 20036

DOUGLAS A. ANELLO

GORDON C. COFFMAN

Counsel

May, 1966.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1290

GREAT WESTERN BROADCASTING CORPORATION
d/b/a KXTV, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This brief is filed with the consent of the parties pursuant to Rule 42 of this Court.

INTEREST OF AMICUS CURIAE

The National Association of Broadcasters (hereinafter called the Association) is a non-profit organization of radio and television broadcasters whose membership included as of May 4, 1966, 2228 AM stations,

1004 FM stations, 483 Television stations, and all of the nationwide radio and television networks. This brief is submitted in furtherance of the objective of the Association which, in accordance with its by-laws,

> ". . . shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustice and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public."

REASONS FOR GRANTING THE WRIT

In the area of labor-management relations, the secondary boycott is of prime concern to broadcasters. The secondary boycott restrains and coerces broadcast stations through unfair economic pressure and seriously impairs their ability to pursue their legitimate business interests. Frequently, the economic injury suffered from a secondary boycott is far more lasting than the effects of a primary labor dispute. Thus, the decision of the 9th U. S. Circuit Court of Appeals is of vital importance to the entire broadcast industry.

The Association has supported over the years numerous Congressional efforts to enact remedial boycott legislation and endorsed the enactment of the present secondary boycott sections of the Labor Management Relations Act of 1947, as amended in 1959 (hereinafter called the "Act").[1] It is the basic belief of the Association that Congress has intentionally and effectively proscribed all secondary boycotts of the nature here involved. The publicity proviso to Section 8(b)

[1] 61 Stat. 140, as amended in 1959, 73 Stat. 525, 29 U.S.C. 158.

(4) while having been interpreted as exempting certain otherwise prohibited union activities as against secondary employers, applies only to those activities which physically contribute to the production of a product for the market—as does transportation of the product, or distributing, or wholesaling.

A broadcast station contributes no service in the production of products being distributed by its advertisers at any time from inception to the final distributional point to the customer. A broadcast station does not handle or otherwise work on the products being so distributed. The advertising services furnished by television, or radio, stations contribute not to the production of the advertised articles, but to the production of customers for them after they become a product.

In its decision (356 F. 2d 434) the Court below said at page 436:

> "The Supreme Court has said that the publicity proviso is to be given as broad an application as the statutory prohibition. It follows that, whatever difficulties an analytical dissecting of the proviso may reveal, they are not to stand in the way of giving that proviso a scope commensurate with the section to which it is amended."

It is the Association's position that the Court of Appeals has gone far beyond any guidelines set forth by this Court in *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46, or *N.L.R.B.* v. *Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, and has given the proviso a much greater scope than that intended by Congress or this Court.

In both *Servette* and *Tree Fruits* there were tangible products capable of distribution. The primary dispute in both instances was with the distributor of that

product. The product which is a primary aspect of the dispute can be followed. On the other hand, where a primary employer provides only a service, not directly handling the product, there is nothing to be followed. The actual performance of the service is the only primary aspect involved, and this cannot be "distributed" by another employer. *Servette* and *Tree Fruits* confine the exemption of the proviso to 8(b)(4) of the Act to situations involving secondary boycotts where there is a forward flow of a product from the primary employer to the secondary employers.

When an advertiser engages the services of broadcast stations, there is no flow of product from the station to the advertiser. At this point there is no station product. Therefore, any coercive publicity directed against an advertiser who uses the services of a broadcast station which has a primary dispute with a union to require him to stop doing business with the broadcast station, is a prohibited secondary boycott in its purest form as spelled out in Section 8(b)(4) of the Act.

If there are products of a broadcaster which would satisfy the requirements of the Act, they are the programs put together and broadcast over his station's facilities and not the products *advertised* over those facilities.

The product of a radio and television station is not unlike that of other advertising media such as newspapers and magazines. A program is the result of the physical efforts of the employees of a broadcasting company in the same way that newspapers and magazines are products of the companies who produce them.

However, a radio or television station differs in one very important respect from other advertising media.

Radio and television stations, because of the peculiar nature of the air waves with which they operate, could not be allowed to develop helter-skelter solely on the basis of free enterprise. Congress determined at an early date that stations would first have to secure a license from a regulatory body established for that purpose to insure the orderly development of nationwide communications.[2] The primary concern today of the Federal Communications Commission in granting a license to applicants is the way in which the applicant intends to operate in the "public interest, convenience, and necessity."[3]

The courts have, on numerous occasions, been called upon to determine the scope of the FCC's authority to define what is in the public interest. In each instance, it is evident that an important factor in that determination is the programming policy of each individual station. In comparative hearings involving two or more applicants for the same facility, the Federal Communications Commission cannot prescribe any type of programs, but it can and does make a comparison on the basis of public interest, and, therefore, public service. In *Johnston Broadcasting Company* v. *Federal Communications Commission,* 175 F. 2d 351, the Court said at page 359: "But in a comparative consideration, it is well recognized that comparative service is the vital element, *and programs are the essence of that service.*"[4] (emphasis added).

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[2] 48 Stat. 1081, 47 U.S.C. 301.

[3] 48 Stat. 1083, as amended in 1962, 76 Stat. 58, 47 U.S.C. 307(a).

[4] See also: *National Broadcasting Co.* v. *United States,* 1943, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 1940, 309 U.S. 134, 138 n. 2, 60 S.Ct. 437, 84 L.Ed. 656.

It can thus be seen that the FCC recognizes the program to be the essential element of public interest and, therefore, the reason why radio and television stations are allowed exclusive use of a particular frequency within a specific, prescribed area. It can be said then that broadcast stations provide the public with an essential product, the program.

Another recognition of the program as the product of a broadcaster is found in the Communications Act itself. Section 325(a) provides in part: ". . . nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."[5]

The Congressional intent to preserve the property rights of the broadcasters was clearly spelled out in the enactment of Section 325(a). It recognized without equivocation the rights of a radio station in its programming. This is apparent from the following statement made by Senator Clarence C. Dill during floor debate on Section 28 of H.R. 9971:[6]

> "As to Section 28, providing that no person, firm, or corporation shall rebroadcast the material broadcast by a station without the station's consent, it is, I think, a very necessary provision. Otherwise we would have a broadcasting station spending a large amount of money to prepare and present a program as a program from that station, and then under the modern methods of rebroadcasting, it could be picked up and broadcast from the other stations. . ."[7]

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[5] 48 Stat. 1091, 47 U.S.C. 325(a).

[6] Section 28 of H.R. 9971 was enacted as Section 28 of the Radio Act of 1927 and ultimately re-enacted as Section 325(a) of the Communications Act of 1934.

[7] 68 Cong. Rec. 2880 (1927).

The authors of the Radio Act of 1927 then, by providing protection for the program of one broadcaster as against unauthorized use by another broadcaster, were acknowledging the program as the product of a broadcaster's labor.

A radio or television station prepares and distributes over its facilities programs identifiable as to content and length. Many stations spend great amounts of time and money to secure the right personnel who possess the special qualities needed to provide a unique service to the public. The programs, then, made up by co-ordinating the efforts of many individuals such as technicians, administrative personnel, directors, and performers, result in a product which is unique from all others.

This product, like a newspaper, is distributed to the public. A consumers' boycott of a radio or television program might be accomplished by direct appeal to the public informing it of the labor dispute and urging its assistance by not listening to the programs of the station in question.

That advertising was not to be, in and of itself, the primary object of broadcasting was emphasized early in the era of radio regulation:

> "While it is true that broadcasting stations in this country are for the most part supported or partially supported by advertisers, broadcasting stations are not given these great privileges by the United States Government for the primary benefit of advertisers. Such benefits as is derived by advertisers must be incidental and entirely secondary to the interest of the public . . . advertising should be only incidental to some real service rendered to the public, *and not the main object of a program.*"[8] (Emphasis added).

[8] 2 Fed Radio Commission Ann. Rep. 168 (1928).

Thus the advertising message of a sponsor is only an ingredient of the broadcaster's product. In other words, the program is the product and advertising is merely an element thereof. The proviso here in question applies only to the end product, the program, going forward and may not be applied backwards to reach the elements of the product. To apply the proviso to a boycott of the advertisers in this situation would be as erroneous as applying it to a boycott of a wheat mill where the primary dispute was with the manufacturer of a cake mix which utilizes the raw flour of the wheat mill in its cake mix.

In the case at issue, the advertisers were not the people handling or distributing KXTV's products, the programs; therefore, the proviso would not protect the unions' activity. The Court below went too far in interpreting the prior decisions of this Court and thus, the instant case provides an excellent opportunity for clarification. To allow this decision to stand would have the effect of foreclosing any future opportunity for the Court to consider this important issue.

CONCLUSION

For the foregoing reasons, the petition of Great Western Broadcasting Corporation for a writ of certiorari should be granted.

Respectfully submitted,

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NATIONAL LABOR RELATIONS BOARD,
Respondent,

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SAN FRANCISCO LOCAL, and NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, LOCAL 55,
Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Intervenors in Opposition to Petition for Writ of Certiorari

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In the Supreme Court of the United States

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Brief of Intervenors in Opposition to Petition for Writ of Certiorari

STATEMENT OF THE CASE

The underlying facts, the opinions of the National Labor Relations Board and the court below, and the questions presented in this proceeding are described in the Petition for Writ of Certiorari. American Federation of Television

and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55 were the respondent labor organizations against which the charge and complaint were filed in the case before the Board, and were Intervenors in the court below.

It is the position of Intervenors that the complaint was properly dismissed by the Board, and that the petition to review and set aside the Board's order was correctly denied by the court below. Accordingly, Intervenors oppose the granting of the Petition for Writ of Certiorari. The Board has presented in its decisions and in its briefs below a full statement of its reasons for construing the so-called "publicity proviso" in Section 8(b)(4) of the Act to protect Intervenors' activity which the complaint alleges to be an unfair labor practice, and Intervenors will defer to the Board for a statement of those reasons in opposition to the present petition. This brief is filed to record Intervenors' agreement with the Board's view on the statutory interpretation question, and to state additional reasons for denying the writ.

REASONS FOR DENYING THE WRIT

1. The court below rested its decision on this Court's interpretation of the publicity proviso in Section 8(b)(4) of the Act as stated in *National Labor Relations Board v. Servette, Inc.*, 377 U.S. 46, and *National Labor Relations Board v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58. Petitioner's argument that these decisions are not controlling in the present case is premised on an unnaturally restrictive reading of the Court's opinions. The unexpressed qualifications which Petitioner implies in the Court's language, in order to accommodate Petitioner's effort to distinguish the present case, cannot be squared with the express awareness in the *Servette* opinion of the circumstances

of the present case. See 377 U.S. at 55, 56. In short, the decision below reflects a straightforward application of the principles stated in *Servette* and *Fruit & Vegetable Packers, Local 760* with respect to a factual situation of which this Court was cognizant when it formulated those principles. There is no contrary judicial authority. Petitioner's suggestion that denial of certiorari in this case precludes the possibility of future opportunity for judicial consideration of the problem does not take into account the amenability of Section 303 of the Act to suits premised on analogous factual situations, wholly independent of the Board's role in the administration of Section 8(b)(4). Under the circumstances, Petitioner has not made a showing that the decision below warrants review by this Court.

2. In reading this Court's opinions in *Servette* and *Fruit & Vegetable Packers* to require dismissal of the complaint in the present case, the court below has properly avoided a result which would be in conflict with the protection given by the First Amendment of the Constitution to the peaceful circulation of handbills. Oral and written appeals, unaccompanied by picketing, for consumer support in a boycott program is constitutionally protected. Compare, *United States v. Hutcheson,* 312 U.S. 219, 243; *Lowell v. Griffin,* 303 U.S. 444, 452; *Thomas v. Collins,* 323 U.S. 506; *Talley v. California,* 362 U.S. 60; *National Labor Relations Board v. Fruit & Vegetable Packers, Local 760,* 377 U.S. 58, 63. The handbilling in the present case fully qualifies for this protection, since it neither sought disobedience of law, nor exerted coercive pressure upon the recipients of the handbills. The handbills simply identified firms which continued to advertise on the television station with which Intervenors had a labor dispute, and requested the public to exercise a voluntary choice to withhold patronage from such firms. The circumstance that economic pressure on such firms

may result from public reaction to the dissemination of facts and opinions respecting the labor dispute is scarcely sufficient to disqualify such dissemination from the protection of the First Amendment. Cf. *Thomas v. Collins,* 323 U.S. 516, 537; *Terminiello v. Chicago,* 337 U.S. 1, 4. In short, Congress cannot constitutionally deny unions the right to identify to the public businesses which trade with employers involved in labor disputes, and Section 8(b)(4)(ii)(B) of the Act cannot, therefore, validly be interpreted to prohibit the handbilling activity in this case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

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May, 1966.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1290

GREAT WESTERN BROADCASTING CORPORATION, d/b/a KXTV, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 2a–6a) is reported at 356 F. 2d 434. Its earlier opinion (Pet. 17a–32a) is reported at 310 F. 2d 591. The original and supplemental decisions and orders of the Board (Pet. 33a–40a, 7a–15a) are reported at 134 N.L.R.B. 1617 and 150 N.L.R.B. No. 46.

JURISDICTION

The decree of the court of appeals (Pet. 1a) was entered on February 9, 1966, and the petition for certiorari was filed on May 6, 1966. The juris-

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diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 8(b)(4)(B) of the National Labor Relation Act (29 U.S.C. 158 (b)(4)(B)) forbids a union to strike or otherwise coerce a neutral employer for the purpose of forcing him to cease doing business with an employer with whom the union has a primary dispute, but exempts "publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer * * *." In the present case the union's primary dispute was with a television station. The question presented is whether the union, in appealing, by handbills and related means, to members of the public not to patronize persons who continued to advertise on the station, was engaged in publicity exempted by the statute.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 141, *et seq.*), are printed at pp. 41a–42a of the petition for certiorari.

STATEMENT

KXTV operates a television station in Sacramento, California. In September 1960, a concededly primary dispute between KXTV and the unions[1] rep-

[1] American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Em-

resenting its employees resulted in a strike against the station and the picketing of its premises. The unions made oral appeals to advertisers who used KXTV to discontinue their patronage of the station, sent letters to advertisers advising them of the background of the strike and warning them of adverse economic reaction if they continued to use the station; and printed and distributed 4,000 handbills listing KXTV as "unfair" and naming several companies as advertisers who continued to utilize KXTV. These handbills were distributed in front of KXTV, at the Sacramento Labor Temple, and at various grocery stores which handled products of the companies in question.[2]

Upon charges filed by KXTV, the General Counsel of the National Labor Relations Board issued a complaint against the unions alleging that they had threatened, coerced, or restrained the advertisers for the purpose of forcing them to discontinue business relations with KXTV, and thereby violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act. The Board found that all of the conduct (other than the mere request that neutrals not advertise on KXTV) constituted threats, coercion or restraint within the meaning of the statute. But it also found that such conduct constituted "publicity, other than

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ployees and Technicians, Local 55. These unions, respondents before the Board, intervened in the court of appeals proceedings.

[2] The unions also sent letters to the San Francisco Labor Council asking it and the members of its affiliated unions to turn in their Shell credit cards (Shell being an advertiser on KXTV), listing 14 companies who were then advertising on KXTV and soliciting "any aid" the Council and the members

picketing," within the meaning of the publicity exemption of the statute ([redacted] n. 5 *infra*), and hence was privileged.[3] Accordingly, the Board dismissed the complaint. (Pet. 10a–15a.) The court of appeals sustained the Board's action, holding that *National Labor Relations Board* v. *Servette, Inc.*, 377 U.S. 46, warranted the Board in applying the publicity proviso to a dispute where the employer—a television station—was a supplier of intangible services (Pet. 2a–6a).[4]

ARGUMENT

The sole question here is whether a television station, as a supplier of advertising services, may be regarded as a producer of "a product or products" "distributed by" other employers, within the meaning of the publicity proviso[5] to Section 8(b)(4)(B)

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of its affiliates "can give"; and threatened two advertisers with naming them in a new leaflet unless they discontinued using KXTV. (Pet. 9a–10a, 34a–37a.)

[3] There was no picketing at the places of business of any of the advertisers, and no work stoppages as a result of the publicity (Pet. 36a).

[4] The Board's order was originally reviewed prior to the decision of this Court in *Servette*, and the court of appeals had then interpreted the proviso as applying only to the manufacturer or processor of a physical product and had set aside the Board's dismissal of the complaint (Pet. 17a–32a). While the case was pending before the Board on remand from the court, the decision in *Servette* was handed down, and the Board, in reliance on that and a related decision (*National Labor Relations Board* v. *Fruit & Vegetable Packers* (*Tree Fruits*), 377 U.S. 58), reaffirmed its original decision. On judicial review of the Board's second order, the court of appeals overruled its earlier decision and sustained the Board.

[5] As pertinent here, the proviso reads:

"That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit

of the National Labor Relations Act (the secondary boycott provision). Applying the principles of this Court's recent decision in *National Labor Relations Board* v. *Servette, Inc.*, 377 U.S. 46, the Board and the court below held that a supplier of services is within the scope of the proviso. We submit that this result is correct and that further review is not warranted.

The issue in *Servette* was whether the proviso permitted a union that had a dispute with a wholesale distributor to pass out handbills at retail stores requesting the public not to purchase items distributed by the wholesaler. The Court held it did, stating (377 U.S. at 55):

> The proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded. * * * It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor. * * * There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress.

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publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer * * *."

If, as this Court held in *Servette*, "producer" as used in the proviso is broad enough to include a wholesaler, it is also broad enough to include a television station which furnishes advertising services; the station, indeed, is if anything more akin to a conventional producer than a distributor is, albeit the station's "products" are intangible. Under the reasoning of *Servette*, the proviso must be this broad. The prohibition of Section 8(b)(4)(B) against certain secondary boycotts extends to boycotts of television stations or other suppliers of intangible services.* Therefore, if publicity against such suppliers is not within the proviso, the proviso is "narrower in coverage than the prohibition to which it is an exception"—a reading rejected by this Court in *Servette*. Furthermore, this Court has explained that the publicity proviso of Section 8(b)(4)(B) was added to dispel the serious First Amendment questions that would have been raised by a prohibition against union efforts to enlist public support in a dispute with an employer. *National Labor Relations Board* v. *Fruit & Vegetable Packers (Tree Fruits)*, 377

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* See, *e.g.*, *National Labor Relations Board* v. *Associated Musicians (Gotham Broadcasting Corp.)*, 226 F. 2d 900 (C.A. 2), certiorari denied, 351 U.S. 962; *Teamsters, Local 901 ("Editorial Imparcial")*, 134 N.L.R.B. 895, 901, Section 10(*l*) injunction sustained on appeal, *Local 901, Teamsters* v. *Compton*, 291 F. 2d 703 (C.A. 1); *Local Union 154, Int'l Typographical Union (Ypsilanti Press)*, 135 N.L.R.B. 991, 996.

U.S. 58, 63–70. These questions would persist if a dispute with a supplier of services was excluded from the proviso,[7] and the publicity that the unions engaged in here was therefore forbidden.

[7] This we think answers petitioner's contention (Pet. 11–13) that *Servette* can properly be limited to its facts, *i.e.*, the distribution of a tangible product; such a limitation would be inconsistent with this Court's reasoning. Nor is it material that the Court bolstered its conclusion in that case by reference (at 377 U.S. 55–56) to cases where wholesaling had been held to constitute "production" under the Fair Labor Standards Act, 29 U.S.C. 203(j). The Court relied on the FLSA merely by way of analogy; it did not suggest that the meaning given to the terms used in that earlier and different statute reflected Congress' purpose in enacting the 1959 proviso to the NLRA. If FLSA precedents be relevant here, we point out that employees engaged in a wide variety of service operations have been held to be engaged in the production (or in work necessary to the production) of goods for commerce within the meaning of the FLSA. See, *e.g.*, *Kirschbaum Co.* v. *Walling*, 316 U.S. 517 (employees engaged in maintenance of loft buildings, the tenants of which were engaged in the production of goods for commerce); *Bozant* v. *Bank of New York*, 156 F. 2d 787 (C.A. 2) (maintenance employees in bank building); *Union National Bank of Little Rock* v. *Durkin*, 207 F. 2d 848 (C.A. 8) (maintenance employees in bank building); *Goldstein* v. *Dabanian*, 291 F. 2d 208 (C.A. 3) (employees of check cashing service); *Public Bldg. Authority of Birmingham* v. *Goldberg*, 298 F. 2d 367 (C.A. 5) (maintenance employees employed by a private contractor managing a building housing federal employees engaged in processing social security claims from a multi-state area); *Mitchell* v. *Dooley Bros., Inc.*, 286 F. 2d 40 (C.A. 1) (employees of independent contractors providing cleaning and garbage removal services to businesses engaged in commerce or in the production of goods for commerce).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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This brief is filed with the consent of the parties pursuant to Rule 42 of this Court.

Interest of the Amicus Curiae

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Its membership consists of the publishers of 978 daily

and/or Sunday newspapers, whose publications represent more than 90% of the total daily and Sunday circulation of newspapers published in this country. This *Amicus Curiae* and its members are vitally interested is an issue presented in this case, namely, whether advertising in communications media is a "product" which may be "distributed" by an advertiser, within the meaning of the publicity proviso to Section 8(b)(4) of the National Labor Relations Act.

Reasons for Granting the Writ

Advertising is the economic lifeblood of newspapers and other mass communications media. Therefore, secondary boycotts against advertisers would have a significant adverse influence not only upon media, including newspapers, but on the free dissemination of information. Accordingly, the decision of the Court below is of vital importance to the newspaper business.

Congress recognized that secondary boycotts are an unfair economic weapon in a labor dispute, in its enactment of Section 8(b)(4) of the National Labor Relations Act. But as this Court pointed out in *N.L.R.B.* v. *Fruit & Vegetable Packers and Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 70, certain constitutional considerations led to the adoption of the publicity proviso.

It is respectfully submitted that in holding that the publicity proviso of Section 8(b)(4) permits a labor union having a dispute with a television station employer to apply economic pressures against the station's advertisers, the Court below has misinterpreted the decision of this Court in *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46. The Court below recognized that its decision results in an incongruity. 356 F. 2d at page 436.

Nevertheless, it reversed its earlier decision solely on the basis of its interpretation of *Servette.*

If the decision of the Ninth Circuit is allowed to stand, it would appear to be applicable to all communications and advertising media, including newspapers.

This *Amicus* respectfully submits that advertising included in the pages of a newspaper in no manner can be deemed a "product" which is "distributed" by its respective advertisers. If a newspaper publisher has a "product" within the meaning of the Act, it is the newspaper itself. Advertisers, however, do not distribute the newspaper.

If advertising in communications media can be deemed a "product" which is "distributed" by the advertiser, it is difficult to visualize any form of business relationship which would not satisfy the conditions of the publicity proviso, and the sanctions established by Congress against secondary boycotts would become almost meaningless. If labor unions having disputes with communications media are free to threaten or coerce advertisers, then media have no protection whatever against secondary boycotts, which frequently are more damaging then the underlying primary labor dispute. If the decision of the Court below is allowed to stand, labor unions would be privileged to attack and destroy media with which they may have disputes by threatening and coercing their advertisers, thereby nullifying the Congressional mandate against secondary boycotts.

Accordingly, it is a matter of grave importance to the newspaper business, as well as to other communications media, that this Court grant certiorari herein.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition of Great Western Broadcasting Corporation for a writ of certiorari be granted.

Respectfully submitted,

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